

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN P. BAIRD; BRET KURIHARA; OS
NEW MEXICO, LLC; BNS RD, LLC;
SEAN SIMPSON; CHARLA SIMPSON;
MARY JO MCHENRY; and K&L
WELLNESS, LLC,

No. 2:20-cv-02010-TLN-DMC

ORDER

Plaintiffs,

v.

OSTEOSTRONG FRANCHISING, LLC;
KYLE ZAGRODZKY; and JOHN
JAQUISH,

Defendants.

This matter is before the Court on Plaintiffs John P. Baird, Bret Kurihara, OS New Mexico, LLC, BNS RD, LLC, Sean Simpson, Charla Simpson, Mary Jo McHenry, and K&L Wellness, LLC’s (collectively, “Plaintiffs”) Motion for Preliminary Injunction.¹ (ECF No. 4.) Defendants OsteoStrong Franchising, LLC (“OsteoStrong”) and Kyle Zagrodzky (“Zagrodzky”) (collectively, “Defendants”) have filed an opposition.² (ECF No. 9.) Plaintiffs have filed a reply.

¹ Plaintiffs originally filed their motion as a Motion for a Temporary Restraining Order but the Court, in its November 6, 2020 Order, denied the Motion for a Temporary Restraining Order and instead construes it as a Motion for Preliminary Injunction. (ECF No. 5.)

² This action involves three named Defendants. Defendant John Jaquish (“Jacquish”) did not join in this opposition.

1 (ECF No. 12.) For the reasons set forth herein, Plaintiffs' motion is DENIED.

2 **I. FACTUAL AND PROCEDURAL BACKGROUND**

3 OsteoStrong is a company that sells franchises for bone density improvement centers that
 4 utilize osteogenic loading equipment.³ (ECF No. 1 at ¶ 22.) The equipment is branded as
 5 "Spectrum equipment" pursuant to a non-exclusive license from Performance Health Systems.
 6 (*Id.* at ¶¶ 19, 20.) OsteoStrong claims Spectrum equipment increases bone density, prevents
 7 osteoporosis, and "diagnose[s], cure[s], mitigate[s], treat[s], or prevent[s] medical diseases." (*Id.*
 8 at ¶¶ 16, 89.)

9 Plaintiffs are small business owners and franchisees of OsteoStrong centers throughout the
 10 United States. (ECF No. 4 at ¶¶ 1, 2.) Plaintiffs allege that OsteoStrong "intentionally omit[s]
 11 certain information, mak[es] affirmative misrepresentations, and intentionally convey[s] false
 12 information prior to executing the [franchise agreement] in an effort to induce potential
 13 franchisees into signing the agreement." (*Id.* at ¶ 35.) Specifically, Plaintiffs were harmed by
 14 Defendants' intentional omission of information regarding known bankruptcies and lawsuits in
 15 Defendants' Franchise Disclosure Document ("FDD"),⁴ their affirmative misrepresentation of the
 16 patent rights and proprietary nature of OsteoStrong's equipment, and their intentional
 17 misrepresentation of their organizational relationship with motivational speaker Tony Robbins.
 18 (*Id.* at ¶¶ 36, 42–47, 48–58, 59–65.)

19 Plaintiffs further allege that OsteoStrong also "create[s] an impossibility of performance
 20 under the [franchise agreement] and negligently expos[es] franchisees to criminal and civil
 21 liability." (*Id.* at ¶ 35.) Specifically, OsteoStrong "violates [f]ederal law by marketing its system

22
 23 ³ "Osteogenic loading" exercises are defined in the Complaint as equipment "intended to
 24 measure forces on bone and muscle, and through the application of force, or loads, foster
 strengthening of both bone and muscle tissue." (ECF No. 1 at ¶ 17.)

25 ⁴ As Plaintiffs note, in accordance with the Federal Trade Commission's Franchise Rule, 16
 26 C.F.R. Parts 436 and 437, a franchisor is required to serve a complete and accurate FDD on each
 27 potential franchisee at least 14 days before entering into a Franchise Agreement ("FA") with the
 28 potential franchisee. (*Id.* at ¶ 23.) Plaintiffs also note that they received and relied upon FDDs
 issued by OsteoStrong. (*Id.* at ¶¶ 37–41.)

1 as a medical treatment,” and further fails to comply with the Federal Food, Drug, and Cosmetic
 2 Act (“FDCA”) and the U.S. Food and Drug Administration (“FDA”) regulations for medical
 3 devices. (*Id.* at ¶¶ 67, 68–88.) Additionally, OsteoStrong “requires franchisees to use these same
 4 marketing materials and practices” and “may unilaterally terminate the FA with the [f]anchisee
 5 for failure to do so.” (*Id.* at ¶¶ 67, 110.) Plaintiffs also allege that the FAs require them to
 6 comply with “all applicable laws, regulations, codes, and ordinances including, without
 7 limitation, all governmental regulations relating to sales and marketing, which includes the FDA.”
 8 (*Id.* at ¶ 113.) However, Plaintiffs believe that performance under the FA is impossible because
 9 OsteoStrong mandates the usage of marketing materials and practices that “[do] not comply with
 10 all applicable laws, regulations, codes and ordinances.” (*Id.* at ¶ 114.) Plaintiffs assert that had
 11 they been aware the marketing materials and practices provided to them were not in compliance
 12 with local and federal laws, they would not have signed the FAs. (*Id.* at ¶ 120.)

13 On October 7, 2020, Plaintiffs filed a Complaint in this Court, alleging claims for: (1)
 14 common law fraud; (2) common law fraudulent inducement; (3) common law negligent
 15 misrepresentation by OsteoStrong; (4) common law negligent misrepresentation by Zagrodzky
 16 and Jaquish in their individual capacity; (5) unjust enrichment; (6) violations of the California
 17 Unfair Competition Law (“UCL”) (Cal. Bus. & Prof. Code §§ 17200–17210); (7) violations of
 18 the California Corporations Code; (8) violations of 15 U.S.C. § 52; (9) violations of 35 U.S.C. §
 19 292; (10) declaratory judgment that the franchise agreements are void as contracts for an illegal
 20 purpose or otherwise contrary to public policy; and (11) preliminary and permanent injunctive
 21 relief. (*See* ECF No. 1 at 36–50.)

22 On November 4, 2020, Plaintiffs filed the instant Motion for a Temporary Restraining
 23 Order. (*See* ECF Nos. 4.) In its November 5, 2020 Order, the Court denied Plaintiffs’ Motion,
 24 construing it instead as a Motion for Preliminary Injunction. (*See* ECF No. 5.) The Court found
 25 the length of time between the first instance of alleged harm and Plaintiffs’ motion contradicts
 26 Plaintiffs’ allegation of immediate, irreparable injury. (ECF No. 5 at 5 (citing ECF No. 1 at 12
 27 (noting the years when Plaintiffs “received and relied upon an FDD” as 2013, 2014, 2015, and
 28 2017)).) The Court also noted Plaintiffs failed to make a showing of immediate, irreparable

1 injury because they have not pleaded in their Complaint or demonstrated in their motion any
 2 specific dates or times to signify that relief is urgently needed. (*Id.* at 6.) On December 3, 2020,
 3 Defendants filed an opposition. (ECF No. 9.) On December 10, 2020, Plaintiffs filed a reply.
 4 (ECF No. 12.)

5 **II. STANDARD OF LAW**

6 Injunctive relief is “an extraordinary remedy that may only be awarded upon a clear
 7 showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555
 8 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). “The
 9 purpose of a preliminary injunction is merely to preserve the relative positions of the parties until
 10 a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also*
 11 *Costa Mesa City Emps. Ass’n v. City of Costa Mesa*, 209 Cal. App. 4th 298, 305 (2012) (“The
 12 purpose of such an order is to preserve the status quo until a final determination following a
 13 trial.”); *GoTo.com, Inc. v. Walt Disney, Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (“The status quo
 14 ante litem refers not simply to any situation before the filing of a lawsuit, but instead to the last
 15 uncontested status which preceded the pending controversy.”).

16 “*A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed*
 17 *on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief,*
 18 *[3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”*
 19 *Winter*, 555 U.S. at 20. A plaintiff must “make a showing on all four prongs” of the *Winter* test
 20 to obtain a preliminary injunction. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135
 21 (9th Cir. 2011). In evaluating a plaintiff’s motion for preliminary injunction, a district court may
 22 weigh the plaintiff’s showings on the *Winter* elements using a sliding-scale approach. *Id.* A
 23 stronger showing on the balance of the hardships may support issuing a preliminary injunction
 24 even where the plaintiff shows that there are “serious questions on the merits . . . so long as the
 25 plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the
 26 public interest.” *Id.* Simply put, plaintiffs must demonstrate, “that [if] serious questions going to
 27 the merits were raised [then] the balance of hardships [must] tip[] sharply” in [p]laintiffs’ favor
 28 in order to succeed in a request for preliminary injunction. *Id.* at 1134–35.

1 **III. ANALYSIS**

2 Plaintiffs specifically request Defendants be enjoined from the following:

- 3 • Representing that their Spectrum equipment or the OsteoStrong system is able
4 to diagnose, treat, or cure any medical condition or using claims like “reversing
Osteoporosis” or “reversing type 2 Diabetes;”
- 5 • Representing that OsteoStrong owns any patented technology;
- 6 • Representing that the equipment is safe;
- 7 • Representing that Tony Robbins is a Partner in OsteoStrong;
- 8 • Ceasing to provide access to services and support as required under the
Franchise Agreement and as established by regular practice for the operation of
the franchises.

9 (ECF No. 4.)

10 In opposition to the instant motion, Defendants argue Plaintiffs cannot show immediate,
11 irreparable harm for three reasons: (1) Plaintiffs’ motion is now moot because they have
12 permanently ceased operating their businesses, meaning Plaintiffs seek an injunction “based on
13 alleged past wrongs only because they cannot now be wronged again”; (2) Plaintiffs do not allege
14 any evidence to show actual harm has been threatened against them or is imminent, nor do they
15 explain why injunctive relief is necessary after years of operating under the FAs; and (3)
16 Defendants do not engage in the conduct Plaintiffs seek to enjoin. (ECF No. 9 at 10–15
17 (emphasis removed).)

18 In reply, Plaintiffs assert their businesses are not permanently closed, as Plaintiffs still “(1)
19 have active agreements with OsteoStrong, (2) have active leases with landlords regarding
20 franchise space, (3) have clientele, (4) own the equipment, and (5) have continuing liability for
21 past and future conduct.” (ECF No. 12 at 3–4.) Plaintiffs maintain there has been no rescission
22 of the agreements, as they seek an injunction “based on continuing, present adverse harms.” (*Id.*
23 at 4–5.) Plaintiffs note the FDD and FA require them “to use marketing and advertising materials
24 which contain misrepresentations and falsities regarding the patented nature of the OsteoStrong
25 equipment, the degree of physical benefit consumers can receive from the equipment, the injury-
26 free nature of the equipment, and the diagnostic, treatment, and curative effects of the
27 equipment.” (*Id.* at 6.) Plaintiffs maintain these are misrepresentations because OsteoStrong’s
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1 equipment has not been reviewed or approved as a medical device by the FDA and FDCA even
 2 though OsteoStrong markets the equipment as a medical device, OsteoStrong does not own the
 3 patent to the equipment in its facilities, and OsteoStrong's equipment is not injury-free since
 4 Plaintiffs and their clientele have experienced injuries. (*Id.*)

5 "An irreparable harm is one that cannot be redressed by a legal or equitable remedy
 6 following trial." *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, 475 F. Supp. 2d 995, 1007
 7 (C.D. Cal. 2007) (quoting *Optinrealbig.com LLC v. Ironport Sys.*, 323 F. Supp. 2d 1037, 1051
 8 (N.D. Cal. 2004); *Public Util. Comm'n v. FERC*, 814 F.2d 560, 562 (9th Cir. 1987)). Plaintiffs
 9 seeking injunctive relief must prove that irreparable harm is *likely*, not just possible, in its
 10 absence. *Winter*, 555 U.S. at 22; *Alliance for the Wild Rockies*, 632 F.3d at 1131. "Issuing a
 11 preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the
 12 Supreme Court's] characterization of injunctive relief as an extraordinary remedy . . ." *Winter*,
 13 555 U.S. at 22. Speculative injury is insufficient to demonstrate irreparable injury. *Goldie's*
 14 *Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (district court's
 15 finding that sublessee of commercial property would lose goodwill and "untold" customers was
 16 speculative, as it was not based on any factual allegations); *Center for Food Safety v. Vilsack*, 636
 17 F.3d 1166, 1172–73 (9th Cir. 2011) (district court abused its discretion in granting a preliminary
 18 injunction with only past examples of harm and no mention of "continuing, present adverse
 19 effects").

20 Here, the Court need not address all of the parties' arguments on imminent, irreparable
 21 injury because it finds Defendants' argument regarding Plaintiffs' failure to demonstrate actual
 22 harm persuasive. Despite the Court explicitly noting in its November 5, 2020 Order that
 23 Plaintiffs have not pleaded in their Complaint or demonstrated any specific dates or times to
 24 signify that relief is urgently needed (*see* ECF No. 5 at 5–6), Plaintiffs surprisingly once again fail
 25 to convince the Court that any concrete harm is forthcoming in their reply. (*See* ECF No. 12.)
 26 The crux of Plaintiffs' argument is that they are currently being forced to choose between
 27 continuing to abide by the FDD and FA and violating the law, or suffering the injury of obeying
 28 the law and losing their businesses. (*Id.* at 4.) However, Defendants note that "Plaintiffs do not

1 cite any action that has been taken against them individually or against OsteoStrong by the FDA”
 2 and that “[i]n OsteoStrong’s entire existence, OsteoStrong has *never* received a complaint from
 3 the FDA.” (ECF No. 9 at 13 (emphasis in original).) The Court finds this point convincing as
 4 evidence of lack of harm. Although Plaintiffs note that they and their clientele “have experienced
 5 injuries all while OsteoStrong actively fails to record, report, or publish these incidents of injury”
 6 (*see* ECF No. 12 at 6), Plaintiffs do not contend that OsteoStrong is required to do so through any
 7 law or contractual obligation. Additionally, Plaintiffs do not provide any information about
 8 complaints from their clientele or employees threatening civil action against them, nor do they
 9 provide information about any impending criminal investigation or action. Based on the
 10 foregoing, Plaintiffs’ contention is that irreparable harm is *possible*, not likely, which is
 11 insufficient for injunctive relief. *See Winter*, 555 U.S. at 22; *Alliance for the Wild Rockies*, 632
 12 F.3d at 1131. If there is evidence of actual imminent, irreparable harm in the future, Plaintiffs
 13 may refile their motion.

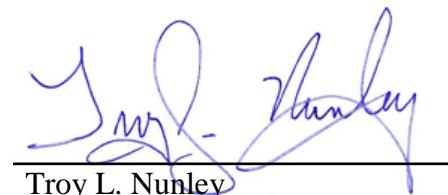
14 As stated in its November 6, 2020 Order, if the Court finds that Plaintiffs have not met
 15 their burden as to one *Winter* prong, then the Court need not address the remaining prongs as
 16 Plaintiffs have not met their burden for injunctive relief. (ECF No. 5 at 5); *see also Alliance for*
the Wild Rockies, 632 F.3d at 1135 (stating that the *Winter* test requires a plaintiff to “make a
 17 showing on all four prongs”). The Court once again finds Plaintiffs have failed to make a
 18 showing of immediate, irreparable injury and therefore declines to address the remaining *Winter*
 19 elements with respect to Plaintiffs’ Motion for Preliminary Injunction. (ECF No. 4.)

21 **IV. CONCLUSION**

22 For the foregoing reasons, the Court DENIES Plaintiffs’ Motion for a Preliminary
 23 Injunction. (ECF No. 4.)

24 **IT IS SO ORDERED.**

25 DATED: May 3, 2021



Troy L. Nunley
United States District Judge